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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

JEFF HATCH-MILLER, Chairman
MARC SPITZER
WILLIAM A. MUNDELL
MIKE GLEASON
KRISTIN K. MAYES

IN THE MATTER OF DISSEMINATION OF INDIVIDUAL CUSTOMER PROPRIETARY NETWORK INFORMATION BY TELECOMMUNICATIONS CARRIERS

DOCKET NO: RT-00000J-02-0066

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APPLICATION FOR REHEARING OF DECISION 68292 OF VERIZON CALIFORNIA INC. INTRODUCTION

Pursuant to Rules of Practice and Procedure of the Arizona Corporation Commission (the "Commission") Rule 14-3-111 and to A.R.S. Section 40-253, Verizon California Inc. ("Verizon") submits this application for rehearing of certain aspects of the Arizona Corporation Commission ("Commission") decision ("Decision 68292") adopting regulations concerning the disclosure and use of Customer Proprietary Network Information ("CPNI").[1]

First, Decision 68292's requirement that carriers verify, within one year, a customer's opt-out approval in effect converts a lawful opt-out provision into an unlawful opt-in provision after one year. By its terms and operation, this "verification"

[1] On November 8, 2005, the Commission voted 4-1 to approve a new Article 21 to Chapter 2 of Title 14 of the Arizona Administrative Code. Specifically, Verizon objects to R14-2-2108, the rule that requires carriers to verify within one year a customer's opt-out approval to use CPNI.

unlawful opt-in provision after one year. By its terms and operation, this "verification" requirement is nothing less than an "opt in" regime, simply delayed by one year. The switch from a regime consistent with federal regulations and the First Amendment to one that conflicts with the federal CPNI regulations and unlawfully burdens truthful commercial speech to existing customers is completely unjustified. Under very clear judicial precedent, the "opt-in" regime is unlawful and its imposition would undoubtedly be quickly enjoined by any court that surveyed the commercial speech precedents that are applicable.[2] The California Commission recently backed away from a proposal to enact an "opt –in" regime, in recognition of the fact that it would cause substantial consumer confusion if administered in conjunction with the federal CPNI regulations and would likely be unconstitutional in any event.[3]

Just as these prior attempts to implement an opt-in scheme for the CPNI-based speech at issue have failed to withstand First Amendment scrutiny under *Central Hudson*,[4] so too does the two-tiered or delayed opt-in scheme adopted by the Commission. There is simply no meaningful distinction between this delayed opt-in scheme and the immediate opt-in schemes struck down before it that could justify the former under the First Amendment. Indeed, the only attributes that distinguish the adopted scheme from those that failed before it render this delayed opt-in scheme even more constitutionally suspect. This is because the combination of a temporary opt-out

[2] In fact, every court to review an "opt-in" regime, whether adopted by the FCC or by a State public service commission, has found it unconstitutional. Placing the burden on willing listeners to affirmatively signal their desire to receive targeted marketing messages in an existing business relationship violates the First Amendment. *See U.S. West, Inc. v. FCC,* 182 F.3d 1224 (10th Cir. 1999) (invalidating the FCC's opt-in requirement under the First Amendment); *Verizon Northwest, Inc. v. Showalter,* 282 F. Supp.2d 1187 (W.D. Wash. 2003).

[3] Faced with the FCC's 2002 CPNI rules and a federal district court decision overturning similar rules in Washington (*Verizon Northwest, Inc. v. Showalter,* supra at n.2), in 2004 the California Public Utilities Commission withdrew proposed CPNI regulations that also called for an opt-in approval regime. *See* California Public Utilities Commission Decision 04-05-057 (*rel.* May 27, 2004) (omitting proposed Part 3 relating to previously proposed privacy-related rules).

[4] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

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scheme followed by an opt-in requirement undermines any suggestion that there is a substantial government interest in requiring opt-in *at any point*. Indeed, it even more clearly fails to substantially advance any such interest, and would undoubtedly lead to greater customer confusion than even an immediate opt-in scheme.

Second, the Commission's *de facto* opt-in regime is also preempted under federal law because the new regime conflicts with the FCC's rules allowing opt-out approval and Congress's intent to establish national, uniform definition and treatment of CPNI for intrastate and interstate services. Decision 68292 has the practical effect of dictating carrier conduct for both intrastate and interstate services and is therefore preempted.

Finally, various other requirements under the adopted rules that conflict with the FCC's rules also raise serious concerns under the First Amendment and the Supremacy Clause.

The Commission should not waste its scarce resources (both administrative and legal) in an area where the FCC and the federal courts have already established a system that protects consumers without unnecessarily restricting First Amendment rights. The Commission should therefore grant Verizon's application for rehearing and eliminate the opt-in verification provision and the other provisions of Decision 68292 identified as legally suspect in this petition.[5]

II. STATEMENT OF FACTS

This docket was commenced on January 28, 2002 pursuant to Decision 64375 — prior to the Federal Communications Commission ("FCC") adopting its operative CPNI rules — on the basis of complaints arising from opt-out notices Qwest sent its customers in late 2001. (*See* Decision 68292, Appendix B, at 1:17-27.)

Decision No. 64375 characterized the public reaction as "an overwhelming

[5] *See* Decision 68292, Appendix A at 4 and adopted rule R14-2-2108.

number of calls from consumers expressing confusion over Qwest's notice and its implementation of an opt-out policy." (Decision 64375, at 6). According to the Decision, Customers expressed frustration in that they could not reach Qwest to "opt-out" of having their CPNI released "because the toll-free number provided by Qwest was often times busy and they could not get through to a Qwest representative." (*Id.*) In addition, consumers said that "they did not understand Qwest's notice" and that it was misleading in certain respects. (*Id.* at 6-7).

The record before the Commission, however, does not reflect widespread—if indeed any—concern by Arizona citizens over the "safeguarding of their CPNI." Indeed, the record shows that the initial concern registered at the Commission was over the clarity of the Qwest opt-out notice and the functionality of its toll free number,[6] not over any use or misuse of CPNI.

The record shows that the complaints which the Commission relies upon for the adopted rules are outdated and have little or nothing to do with misuse of CPNI. In early 2005, the Arizona Wireless Carriers Group sought and received from the Commission copies of all consumer complaints related to CPNI. As explained in comments, the majority of the complaints attached to the response addressed telemarketing issues, *not misuse of CPNI.*[7] In addition, the majority of the complaints arose in 2002 and involved only one carrier — Qwest. Of major significance, virtually no CPNI complaints were filed after the FCC adopted its 2002 CPNI rules and other carriers began implementation of the FCC's approved opt-out approach.[8] In fact, absent complaints related to Qwest in

[6] Even as regards the Qwest notice, the Decision fails to set out any facts supporting its characterization of the public reaction. The Order does not quantify the number of letters or calls received expressing concerns with Qwest's opt-out notice, and does not establish how Qwest's proposed use of CPNI was offensive in any way or militated towards the adoption of an opt-in regime.

[7] *See* Comments of Arizona Wireless Carriers Group of Staff's Notice of Filing filed April 25, 2005 (submitting comments to clarify what the Staff's data request responses contain).

[8] *Id.* at 2.

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2001 and early 2002, there is only one CPNI complaint involving a specific carrier.[9] One complaint does not prove a consumer problem or harm, nor do outdated complaints provide a basis for adopting rules that are in direct conflict with the FCC CPNI rules.

III. ARGUMENT

A. The Verification Provision of the Adopted Rules Violates The First Amendment.[10]

1. The Adopted Rules Restrict Speech.

Despite the Staff's suggestion that the delayed opt-in regime does not restrict carriers' speech, there can be no question that it does. Every court to consider the question has confirmed that, under the Supreme Court's jurisprudence, any such CPNI restrictions do implicate the First Amendment.[11] Indeed, it is hard to think of a greater intrusion in the area of commercial speech than that which would prevent a company from discussing possible changes in service options with an existing subscriber. Even the Commission itself implicitly concedes (without deciding) that its adopted rules do

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[9] *Id.*

[10] Verizon assumes, as the Commission suggests in the Decision, that it is the Commission's intent to preserve the FCC's "total service approach," without modification. To the extent this is incorrect or the language adopted by the Commission could be interpreted as modifying this approach, any limitation on the federal "total service approach" would also violate the First Amendment and be preempted under federal law, *see infra* Part III.B.

[11] In *U.S. West*, the Tenth Circuit held that "the existence of alternative channels of communications, such as broadcast speech, does not eliminate the fact that the CPNI regulations restrict speech." 182 F.3d at 1232. In so doing, it rejected as "fundamentally flawed" the notion that the FCC's opt-in rules did not "infringe upon [the carrier's] First Amendment rights because they only prohibit[ed] it from using CPNI to target customers and d[id] not prevent [it] from communicating with its customers or limit anything that it might say to them." Similarly, in *Verizon Northwest*, the district court found that Washington's proposed opt-in regime "indirectly affect[ed] Verizon's marketing by requiring prior customer approval for the use of CPNI in both developing and targeting that marketing" and held that "[s]uch targeted marketing [wa]s protected commercial speech." 282 F. Supp. 2d at 1190-91 (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)). As the court explained, Washington's opt-in requirement "directly affect[ed] what c[ould] and c[ould not] be said" and accordingly "implicate[d] the First Amendment." *Id.* at 1191 (citing *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 790 n.5 (1988) (finding First Amendment implicated where "effect of the statute is to encourage some forms of solicitation and discourage others")). The court further rejected the argument made by the Washington Commission, and echoed here by Staff, that its CPNI restriction "*simply* ma[de] speech more expensive, less convenient, or even less effective." *Id.* at 1191 (emphasis added); *see also* Decision 68292, Appendix B, at 10 ("Staff argues that the CPNI restrictions amount only to regulation of carriers' methods of collecting and using CPNI, which Staff asserts does not limit carriers' communication or expressive activities toward a willing audience.").

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implicate free speech and proceeds with an attempt to "analyze" its rules (albeit in a cursory and inaccurate fashion) under the First Amendment. (Decision 68292, Appendix B, at 10-11.)

As in the case of the opt-in regimes struck down elsewhere, the Commission's delayed opt-in scheme would severely curtail otherwise lawful carrier speech. Verizon uses CPNI to communicate with its existing subscribers regarding their service, their usage patterns, and new offers or better "packages" to serve their individual needs. It also uses CPNI to conduct customer surveys and in the research and development of new services and new rate and service plans. At the same time, Verizon does not "sell" or "lease" subscriber CPNI to any companies outside the Verizon family. Nor does Verizon use or allow the use of its subscriber CPNI for the purpose of marketing any goods or services other than communications-related goods and services. In its national and regional operations, the use of CPNI is essential to Verizon's ability to target market specific products and services that would be of most interest to its customers. Target marketing is a particularly effective mode of carrier-customer communications and allows Verizon to decrease the amount of mass and untargeted marketing on which it would otherwise have to rely. Verizon also uses CPNI in product development and research and shares CPNI with independent contractors to develop new products and services. This is all done in strict compliance with the FCC's regulations regarding consumer consent and strictures to be placed on any agents or independent contractors who handle Verizon CPNI.

The practical effect of the Hobson's Choice provided by the adopted rules—to use an immediate opt-in method or to use a delayed opt-in method—is to ban Verizon's CPNI-based communications with respect to Arizona CPNI and customers altogether. This is because the opt-in system is completely unworkable—it assumes that consumer inertia is a justification for silencing speech. Opt-in campaigns are extremely expensive

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to administer and yield opt-in rates that effectively result in a complete ban on targeted marketing. This in turn means that many willing listeners are denied access to truthful commercial speech designed to save them money or improve their communications services which they would otherwise welcome. In Verizon's case, retooling its national "opt-out" consent systems and marketing processes to comply with unique regulations in Arizona would not be worth the candle. Verizon would simply cease any targeted marketing speech to its approximately 9000 customers in the state.[12]

The "delayed" nature of the opt-in scheme the adopted rules contemplate does nothing to change this calculus. Indeed, the possibility of first engaging in an opt-out campaign only to be followed in fewer than 12 months with a "verification" or opt-in campaign is simply nonsensical. Even if such a two-tiered campaign were not prohibitively expensive, it would undoubtedly be ineffective at ascertaining which customers would welcome specially tailored speech and products and services. This is because such a two-tiered campaign would likely cause great customer confusion. Quite simply, most customers would be perplexed by a rule that says they need do nothing for an entire year to permit the use of their CPNI only to be told that they need to take action and provide affirmative consent to such use a year later. (This confusion would only be compounded when combined with an FCC-compliant opt-out notice for interstate services and wireless services)

Accordingly, the delayed opt-in option is, for Verizon, no option at all. Nor is a "pure" opt-in campaign given its cost and imprecision in determining who would actually welcome CPNI-based communications and products and services developed through CPNI-based communications. If unchanged, the adopted rules would thus cause

[12] Since the bulk of today's target marketing is aimed at customer retention through the offer of lower cost service plans or bundles, Arizona consumers would lose out in the end as competition for subscriber retention through targeted marketing campaigns would diminish.

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Verizon to cease using all Arizona CPNI for its target marketing speech and product development communications. This effect clearly "implicates" the First Amendment.[13]

Moreover, Decision 68292 effectively ignores the fact that its *de facto* opt-in regime would impinge upon the rights of willing listeners—the millions of consumers who welcome communications based on information included in CPNI about their telecommunications services.[14] Both the Supreme Court and the Ninth Circuit have held that the First Amendment protects the rights of willing listeners to receive truthful commercial messages.[15] Because the rules would restrict the audience in a manner that denies millions of willing listeners access to truthful commercial speech, the rules must be justified through First Amendment scrutiny.

2. The Adopted Rules Fail *Central Hudson* Scrutiny.

Carriers' communications with their customers regarding new or modified services and with their affiliates, independent contractors, and joint venture partners constitute constitutionally protected commercial speech.[16] The Commission concedes that such speech "is lawful and not misleading."[17] Accordingly, under *Central Hudson*,

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[13] The fact that carriers could, as a theoretical matter, request an extension would only delay the restriction on speech. As a practical matter, the fact that the two-tiered process is prohibitively expensive is unchanged by the possibility of an extension. Indeed, in the absence of any standards for when an extension could be granted, the extension mechanism itself raises serious questions under the First Amendment as a prior restraint on speech subject to the Commission's standardless discretion.

[14] *See* Opinion Research Corporation, Princeton, N.J. & Prof. Alan F. Westin, Columbia University, *Public Attitudes Toward Local Telephone Company Use of CPNI*, (survey November 14-17, 1996) (finding that a total of 93% of the American public approves of a carriers' target marketing where opt-out is permitted).

[15] *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising."); *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991) ("The government's imposition of affirmative obligations on the residents' first amendment rights to receive speech is not permissible.").

[16] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[17] While Commission Staff earlier suggested that the carrier speech involved here was misleading, and that the Commission would not be regulating speech, (see January 19, 2005 Staff's Response Comments at 6-8), the Decision rejected this position and found that carriers "are engaging in commercial speech that is lawful and is not misleading." Decision 68292, Appendix B at 10:26-11:1. In fact, because the adopted rules target marketing and product development speech and because they reach internal speech that does not propose a particular transaction,

the Commission bears the burden of demonstrating: (1) a substantial governmental interest in restricting speech; (2) that its regulations directly advance the asserted interest; and (3) that the restrictions are not more extensive than necessary to achieve the asserted interest. The verification rule fails each requirement.

a. Decision 68292 Fails to Demonstrate a Substantial and Particularized Interest the Verification Provision Protects.

Under *Central Hudson's* substantial governmental interest prong of the test, the Commission must show that there is a "particular notion of privacy" that is served by the new burdens on speech and that this privacy interest is a substantial one.[18] The Commission has made no such showing.

There is no privacy interest—substantial or otherwise—as between a telecommunications carrier and its related entities, and an *existing* customer, that would prevent the carrier from communicating with its customer regarding that customer's usage of the carrier's services. Such a right is not recognized at common law or in any state or federal statute of which Verizon is aware. Its existence has been expressly rejected by the FCC, which found, based upon an extensive nationwide record, that there is no substantial privacy interest implicated by carriers' using CPNI to communicate with existing customers regarding communications-related products and services.[19] Indeed, because carriers use exactly this same data to bill and provide service, they

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many aspects of the adopted rules might be subject to more stringent First Amendment scrutiny than that embodied in the *Central Hudson* test. Because the Commission has not compiled any record in support of its adopted rules and has not even attempted a meaningful justification for its adoption under the test for restriction of truthful commercial speech, it is quite clear that these rules could not pass muster under any level of First Amendment scrutiny.

[18] *U.S. West, Inc. v. FCC,* 182 F.3d 1224, 1235 (10th Cir. 1999); *see Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *Thompson v. W. States Med. Ctr*, 535 U.S. 357 367 (2002).

[19] Indeed, the FCC found that most customers expect their carriers to use CPNI to develop and market products to them. (*See* FCC 2002 Order, ¶ 36 ("[A] large percentage of telecommunications customers ... expect that carriers will use CPNI to market their own telecommunications services and products, as well as those of their affiliates.").)

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already have access to and discuss this data with the customer in these contexts. Thus, the peculiar privacy interest asserted by the Commission is not in denying access to private information, but limiting its *use* to one type of speech as opposed to another.

The Commission provides no legal or factual support for the existence of this peculiar conception of privacy. In its scant discussion of the issue, the Commission appears to rely on two items to support its purported interest.

First, the Commission states that "Staff cites several national consumer surveys by Harris Interactive showing that customers are concerned that 'companies they patronize will provide their information to other companies without [their] permission' . . . and that customers are taking responsibility for protecting their own privacy." (Decision 68292, Appendix B, at 11:9-12).[20] On its face this statement does not support the notion of privacy at issue. As to the concern, it is a general one that suggests what Verizon does not here dispute, that customers may be concerned if a company sells their information to wholly unrelated third parties. It says nothing about how customers feel about CPNI-type information being used in the context of an ongoing business relationship and among related companies to offer them targeted marketing and better products and services. Moreover, it includes an important qualifier—that their concern comes from such disclosures without their permission—that is confirmed by the second "finding." Customers are able to, and do, take responsibility for protecting their own privacy. This is precisely why an opt-out approach is effective at allowing customers to protect any privacy interest they may have in CPNI used in the existing business relationship context.

Second, the Commission points to the concerns raised when Qwest issued its opt-

[20] The single Harris Interactive surveys upon which Staff relies appears to be *Privacy On and Off the Internet: What Consumers Want*, released on February 7, 2002, although it is not available at the website provided in the Staff's Response Comments (n.17).

out notice in 2001. (Decision 68292, Appendix B, at 11). Again, taking the Commission's "finding" on its face—that "[m]any customers appeared and spoke before the Commission regarding their grave concerns regarding the release of their CPNI" and that "many stated their desire that the release of their CPNI should be their choice"—it does not support the notion of privacy that would be protected by the "verification" rule. It says nothing about customers' inability to exercise this choice through a properly administered opt-out regime. As noted in the Statement of Facts, the Qwest-related concerns centered around telemarketing issues, *not misuse of CPNI.*[21] And virtually no CPNI complaints were filed after the FCC adopted its 2002 CPNI rules.[22] Thus, there is simply no evidence from the Qwest experience to support a notion of privacy that demands an opt-in, and not an opt-out, regime.

Indeed, Commission Staff has effectively conceded that there is a lack of factual support in the record. In its Response Comments filed January 19, 2005, Staff states as follows:

> [T]he state is using commonsense to enact a prophylactic rule. . . . Thus, despite the state's lack of factual evidence, . . . common-sense dictates [for] a rule requiring a carrier to verify a customer's consent . . . [23]

The record clearly does not contain the type of empirical evidence required where speech restrictions are concerned. Indeed, in the First Amendment context "prophylactic" is a synonym for "unjustifed" or "overbroad" and would, standing alone, suggest a legal infirmity.[24]

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[21] *See* Comments of Arizona Wireless Carriers Group of Staff's Notice of Filing filed April 25, 2005 (submitting comments to clarify what the Staff's data request responses contain).

[22] *Id.* at 2.

[23] *See* Staff's Response Comments at 10:21-11:14 (emphasis added).

[24] *Edenfield*, 507 U.S. at 770-71 ("This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites

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The Commission has in effect adopted rules based upon a generalized sense (or perceived "commonsense") that customers are concerned about misuse of CPNI without actually establishing by record evidence that CPNI is being misused and the FCC regulations are insufficient to protect Arizona consumers from any such misuse. A substantial government interest is not established by intuition or speculation. Indeed, the 9th Circuit has rejected speech restrictions that were based on the "intuition of Board members." *Nordyke v. Santa Clara County*, 110 F.3d 707, 713 (9th Cir. 1997). And the *U.S. West* decision found speculation contrary to law: "[Defendants] merely speculate that there is a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given the notice and opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires."[25]

b. The Commission Cannot Establish That its Novel Opt-In Verification Regime Would Directly and Materially Advance any Substantial Government Interest.

The Commission also must prove "that the challenged regulation advances the Government's interest 'in a direct and material way.'"[26] This burden "is not satisfied by mere speculation or conjecture; [the government] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[27] Even assuming that the Commission could demonstrate a substantial government interest at stake, it has made no showing that the delayed opt-in rule it has adopted will advance that interest to any material degree. Nor has the Commission addressed why the harm it

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are real and that its restriction will in fact alleviate them to a material degree."); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 667 (1994).

[25] *U.S. West*, 182 F.3d at 1239.

[26] *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995).

[27] *Edenfield*, 507 U.S. at 770-71.

seeks to alleviate does not exist in the first year following the opt-out choice but does exist one year later.

Instead the Commission concludes in a single sentence that "[t]he proposed rules directly advance the state's interest in protecting the customers' information and engaging the customer in an active and informed way in controlling how telecommunications carriers use and disseminate, or whether they disseminate, CPNI." (Decision 68292, Appendix B, at 11:24-26.) First, as to protecting customers' information, as explained above, there is no evidence that any carriers' have misused customers' information by using it when not permitted to under the FCC's rules. And, if this were an actual problem, the remedy would be vigorous enforcement of the FCC's rules, not the creation of a confusing and self-contradictory "first opt-out, then opt-in" regime for intrastate services. In other words, a carriers' decision to misuse CPNI contrary to the scope of the customer's consent could occur regardless of the type of consent obtained—affirmative opt-in consent or passive opt-out consent.

Second, as to engaging customers in an active and informed way, the "verification" rule is highly suspect. If what the Commission means is that it wants customers to have truthful and not misleading information, then there is no need for any additional rule as the Commission has already conceded that carriers' CPNI-based speech is truthful and not misleading. Even if the Commission could substantiate that customers need greater clarity in understanding how their CPNI is used, the adopted rules actually work *against* this interest by creating an elaborate two-tiered opt-in scheme that differs from any FCC-compliant notice customers have already received and would entail sending mixed messages to customers. The requirement of sending at least two notices—one explaining that no action is needed to permit the use of the customer's CPNI followed by a second that requires the customer to take the affirmative step of voicing their prior approval—would engender massive consumer confusion and silence a

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substantial amount of carrier speech without any concomitant gain in consumer privacy.[28]

Third, if instead the Commission means that it wants customers to be "active" about protecting their information, then it is difficult to see how anything other than an opt-out regime—which allows customers to take action to stop certain communications—is necessary. In fact, it is difficult to see how Arizona customers could be as vocal about their privacy as the Commission suggests and yet be too reticent, or unable, to opt-out.

Fourth, another possibility, that the Commission simply believes that an affirmative consent regime is necessary to protect some particularized interest in privacy, is completely undermined by the one-year delay permitted under the "verification" option. When exceptions and inconsistencies counteract the alleged purpose of a speech restriction, the restriction fails the direct advancement test.[29] Here, if there is a real and substantial need to solicit affirmative "active" consent from customers before their CPNI can be used, then a remedy that would permit carriers to use such information for a full year before obtaining such consent is no remedy at all; and obviously does not materially advance any such purported interest.

Fifth, to the extent Decision 68292 is really about protecting consumers from marketing, the Rules would have the perverse effect of *increasing* the volume of unwanted telemarketing and direct mail. This is because, in the absence of CPNI-based marketing targeted to specific customers, carriers would be forced to engage in broader solicitations for products wholly inapplicable to customers contacted.

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[28] *Verizon Northwest,* 282 F. Supp.2d at 1193 (finding Washington's CPNI rules, which would subject different types of CPNI to different consent regimes, "dauntingly confusing" and that "the state's interest will not be advanced given the confusion over the regulations").

[29] *Id.*; *see Rubin*, 514 U.S. 476; *Valley Broadcasting Company v. United States*, 107 F.3d 1328, 1335-36 (9th Cir. 1997).

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Finally, the adopted rules are "riddled with exceptions," making it even more unlikely that the speech restrictions would actually succeed in protecting any purported privacy interest that the adopted rules seek to protect.[30] That is, under the adopted rules, carriers can continue to use CPNI to bill and provide services, and nothing prevents carriers from accessing and using CPNI to, *inter alia*, resolve customer complaints or provide records to a data base management service for 911 purposes. The privacy distinction between use of CPNI to provide an accurate bill or resolve a consumer complaint as opposed to developing and offering a new, lower cost service plan is indecipherable.

c. The Commission Makes No Adequate Effort to Prove that the Verification Provision of the Adopted Rules is Narrowly Tailored.

Even if there were a substantial interest in protecting consumers' privacy from their own carriers, the Commission has not "affirmatively prov[en] that the [R14-2-2108 is] narrowly tailored to serve a substantial state interest."[31] Again, the Commission concludes that the "proposed CPNI rules are narrowly tailored to serve the interests articulated above. The benefits of protecting customer information outweigh the comparatively minimal burden that the time, place and manner restrictions on commercial speech the proposed rules place on the carriers."[32] In its analysis of whether the verification requirement is narrowly tailored, Commission Staff did not cite to any authority in support of its conclusion.[33] Staff's "analysis" merely concluded that the verification provision is reasonable but did not articulate how this provision is more tailored than a properly administered opt-out rule.

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[30] *W. States*, 238 F.3d at 1095.

[31] *Project 80's*, 942 F.2d at 637; *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001).

[32] Decision 68292, Appendix B at 12:1-4.

[33] *See* Staff's Response Comments at 11:15-13:11.

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By failing to articulate how the rules are narrowly tailored, the Commission implicitly adopts a presumption that all customers would reject target marketing and the benefits of target marketing in favor of some undefined concept of privacy. This presumption is particularly unjustified in the context of an existing and ongoing business relationship—indeed most consumers expect Verizon personnel to be familiar with their bills and usage patterns. By adopting a default presumption that *all* customers prefer privacy and are within one year "opted-out" of any use of CPNI unless they affirmatively manifest preferences to the contrary, Decision 68292 restricts substantially more speech than is necessary to protect the alleged privacy interest at stake. It also presumes that customers who opted out initially did not make a conscious choice to do so, and effectively *negates* that choice (even though there may have been no complaint or objection to the use of CPNI during the year) unless the customer takes affirmative action to affirm the earlier choice.

In fact, the FCC concluded after an exhaustive proceeding that only a combined "total service approach"[34] and opt-out regime (including sharing among affiliates and with agents and independent contractors)[35] could survive First Amendment scrutiny

[34] According to Decision 68292, the adopted rules attempt to retain the FCC's total services approach. *See* Decision 68292, Appendix B at 4:5-24 ("Staff states its intention to use the Total Services Approach, and addresses this concern by recommending [modification of the rule]. . . . We agree with Staff.").

[35] The federal rules are explained and included in *Implementation of the Telecommunications Act of 1996*, Third Report & Order, No. 96-115 (July 25, 2002) ("FCC 2002 Order"). *See also* 47 U.S.C. § 222. Under what is known as the "total service approach," the federal rules permit carriers to use and discuss CPNI in offering services of the same type as those to which the customer already subscribes (*e.g.*, local service, interexchange service, or wireless service), without the carriers obtaining customer approval beyond the existing business relationship. That is, permission to use CPNI under such circumstances is inferred from the customer-carrier relationship. *See* FCC 2002 Order, ¶ 83. For "communications-related" use of CPNI outside the "total service approach," carriers need only obtain "opt out" approval, whereby customers are given the opportunity after being provided notice to deny carriers' the use of CPNI. *Id.* at ¶ 40. Carriers need only obtain "opt in" approval if they intend to disclose CPNI to unrelated third parties or use CPNI for "non-communications related" purposes. Within the "total service approach," carriers may share CPNI with their agents, affiliates, independent contractors, and joint venture partners without obtaining any additional consent. 47 C.F.R. § 64.2005(a). Outside of the "total service approach," the FCC permits carriers to disclose CPNI for "communications-related" purposes to agents, affiliates, independent contractors, and joint venture partners *subject only to opt-out approval*, as long as sharing with independent contractors or joint venture partners is done pursuant to a nondisclosure agreement. *Id.* § 64.2007(b).

under the narrow tailoring requirement of *Central Hudson*.[36] The Commission correctly acknowledges that an "*opt-in approval process* prior to release of CPNI *is unconstitutional*" but relies upon the subsequent verification process to justify the rules because such process "has not been the subject of judicial review." (*See* Decision 68292, Appendix B at 10:1-6 (emphasis added).) The FCC's opt-out approach is not only an "obvious and substantially less restrictive alternative"[37] to the opt-out approval with verification approach, but also a highly effective one.[38] Indeed, both the Supreme Court and the Ninth Circuit have struck down speech restrictions that required affirmative consent to receive speech where a true opt-out regime was possible.[39]

Project 80's, Inc. v. Pocatello, for example, is directly applicable to the delayed opt-in regime at issue here. In *Project 80's*, the Ninth Circuit rejected local ordinances intended to protect consumers from unwanted door-to-door solicitations that required residents to take an affirmative action—the posting of a "Solicitors Welcome" sign—to receive wanted solicitations. Noting that any privacy concern could be "easily served" by permitting those residents who did not welcome such speech to post signs to that effect, allowing them to opt-out of such solicitations, the Ninth Circuit held that the affirmative consent requirement failed the narrowly tailored prong of *Central Hudson*. As the Ninth Circuit explained, "[t]he government's imposition of affirmative obligations on the residents' first amendment rights to receive speech is not

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[36] *See, e.g.*, FCC 2002 Order, ¶ 44 ("an opt-out regime ... directly and materially advances Congress' interest in ensuring that customers' personal information is not used in unexpected ways without their permission, while at the same time avoiding unnecessary and improper burdens on commercial speech).

[37] *U.S. West*, 182 F.3d at 1238-39.

[38] Carriers have conducted opt-out campaigns throughout the country and in Arizona with few complaints, and there is no evidence that a substantial number of customers were unable to exercise their right to opt-out.

[39] *See, e.g.*, *Project 80's*, 942 F.2d at 638; United States v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 809-10, 823 (2000).

permissible."[40]

Moreover, the FCC's 2002 Order offers other means of protecting privacy—in addition to the opt-out mechanism contemplated by *Project 80's*—without imposing a blanket presumption against speech. For example, if the Commission is concerned about safeguarding CPNI when carriers share CPNI with independent contractors, it could adopt the FCC's nondisclosure agreement requirements without requiring opt-in approval.[41] And, if the Commission had concerns that customers may not understand their rights under the federal rules, then it could engage in its own speech to explain how the FCC's rules work. Instead of seriously considering any of these alternatives, Decision 68292 adopts a "verification" regime that will actually increase customer confusion by creating an environment in which consumers will not understand why they are being asked to explicitly verify a decision they made a year earlier. The Commission thus leaps to speech restrictions that are at least as restrictive as the 1998 FCC rules struck down by the Tenth Circuit and CPNI rules struck down by the Washington district court. This sort of "prophylactic rule"[42] is precisely what the First Amendment forbids, for "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort."[43]

Decision 68292 thus contains the fatal legal error of not justifying the new rules through adequate First Amendment scrutiny. While Decision 68292 claims to meet the

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[40] 942 F.2d at 638-39 (emphasis added).

[41] 47 C.F.R. § 64.2007(b)(2).

[42] *See* Staff's Response Comments at 10:21-11:14.

[43] *W. States*, 535 U.S. at 373. The numerous administrative requirements connected with the adopted rules that must be satisfied *before* a carrier may use truthful information or speak to its customers regarding certain subjects also form a prior restraint on carriers' speech and their customers' right to receive speech. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969).

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standards articulated in the *Central Hudson* and *U.S. West*[44] decisions (Decision 68292 at 10:9-12:4), it does not. This failure will subject Decision 68292 to the same fate as similar regulations in other states have suffered — successful challenges that the rules are unconstitutional.[45] Although carriers have consistently raised the First Amendment issue in this docket, it is the *Commission's* burden, not commentors' burden, to build the required evidentiary record to support its new speech restrictions under the *Central Hudson* test.[46] It has not. The provision of the adopted rules that require verification of opt-out approval is therefore invalid.

B. Decision 68292 Is Preempted Under Federal Law.

It is clear that 47 U.S.C. § 222, and the FCC's regulations made pursuant thereto, apply to both intrastate and interstate telecommunications services.[47] The precise scope of the Commission's adopted rules is unclear. The Commission acknowledges various carriers' argument that the rules "should apply only to intrastate CPNI," (Decision 68292, Appendix B, at 1:6-9), and the Staff's response that they should "apply to all CPNI gathered by telecommunications carriers that provide telecommunications service in Arizona," (*id.* at 1:11-12), but it does not discuss this dispute. In R14-2-2101, it states

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[44] *U.S. West,* 182 F.3d at 1224.

[45] *Id.*; see *also, e.g., Verizon Northwest, Inc. v. Showalter,* 282 F. Supp.2d 1187 (W.D. Wash. 2003). The federal district court in the Western District of Washington, enjoined Washington State's CPNI rules concluding that the state's restrictions on carriers' use of CPNI—calling for an opt-in regime — did not meet the *Central Hudson* test and therefore violated the First Amendment. Similarly, faced with the FCC's 2002 CPNI rules and the decision overturning Washington's rules, in 2004 the California Public Utilities Commission withdrew proposed CPNI regulations that also called for an opt-in approval regime. *See* California Public Utilities Commission Decision 04-05-057 (*rel.* May 27, 2004) (omitting proposed Part 3 relating to previously proposed privacy-related rules).

[46] *See, e.g., W. States Med. Ctr. v. Shalala,* 238 F.3d 1090, 1093-94 (9th Cir. 2001), *aff'd,* 535 U.S. 357 (2002).

[47] The statute refers throughout to "telecommunications carrier[s]" and "telecommunications service," broad terms that include intrastate and interstate service providers and services. The statutes also specifically references CPNI derived from "telephone exchange service" in Sections 222(f)(1)(B) and 222(e). "Telephone exchange service" is a defined term under the Communications Act, *see* 47 U.S.C. § 153(47), and refers to service that is almost exclusively intrastate in nature. These statutory provisions caused the FCC to conclude in its 1998 CPNI Order (¶ 20) "that section 222, and the Commission's authority thereunder, apply to the regulation of intrastate and interstate use and protection of CPNI."

simply that the rules apply to CPNI "for all telecommunications carriers that provide telecommunications service in Arizona" and "govern the release of CPNI in Arizona." To the extent the Commission is attempting to regulate CPNI derived from the provision of interstate services, it has no authority to do so. This authority resides exclusively with the FCC, which has plenary authority to regulate interstate services.[48]

Even the Commission's regulation of CPNI derived from intrastate services, moreover, is preempted under federal law. First, under Section 222 itself, the federal statute makes no distinction between interstate and intrastate CPNI. Congress evaluated the various kinds of customer information—including "CPNI," "aggregate information," and "subscriber list information," 47 U.S.C. § 222(h)(1)-(3)—and chose to create a distinct and unitary category of information known as "CPNI." *Id.* § 222(h)(1). The FCC has recognized both this statutory choice and the infeasibility of any approach wherein carriers would be required to subdivide CPNI into further categories, including between interstate and intrastate CPNI. Specifically, it found that a bifurcation into subcategories runs contrary to Congress' unambiguous intent in defining all types of customer proprietary network information under one definition of CPNI in Section 222. In addition, we are not convinced that carriers would be able to implement such a distinction in their existing customer service, operations support, and billing systems, where facilities information and call detail all may reside without distinction.[49]

Because proper application of the Commission's rules would require carriers to bifurcate CPNI into subcategories with substantially different approval regimes, where Congress provided for a uniform, national treatment of CPNI without distinction between interstate and intrastate CPNI, the rules are clearly preempted under 47 U.S.C. §

[48] *See* 47 U.S.C. §§ 152(a), 201, and 202.

[49] 2002 CPNI Order, ¶ 121 n.279.

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222.

The delayed opt-in or "verification" rule is also preempted by the FCC's rules because "compliance with both federal and state regulations is a physical impossibility."[50] Here, there is simply no way for carriers to obey both the Arizona and federal requirements. Arizona effectively requires an opt-in notice for use of CPNI to market products that fall outside of the total service approach and to share CPNI with related parties, whereas the FCC has held that Section 222 allows such use and disclosure for communications-related purposes subject only to an opt-out notice and approval. Sending two notices to the same consumers would unduly confuse customers, as carriers attempted to explain not only the differences between the Commission's rule and the FCC's rules but also which CPNI was subject to which regulatory regime. (This confusion would only be compounded by the sheer number of notices and documents that would be required under the Arizona scheme—an FCC opt-out notice, an Arizona opt-out notice, and a subsequent Arizona "verification" message or notice.) Indeed, the crazy quilt between wireless, interstate and intrastate wireline services, as well as the inherent conflict between the "first notice" and the one-year "verification" requirements, would result in consumer confusion far greater than that caused by the Qwest notice. Carriers would thus be subjected to a *de facto* opt-in requirement for all CPNI in Arizona, no matter whether it was intrastate or interstate.[51]

Carriers would also be unable to develop methods and procedures for treating in-

[50] *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *see Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986); *People of the State of California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) ("*Computer III*"). In its 2002 Order (¶¶ 69-70), the FCC did decline to exercise *its* preemptive authority on a national per se basis in lieu of a case-by-case approach. The FCC did not, nor could it, suggest that where *Congress* intended to preempt contrary state laws under 47 U.S.C. § 222, contrary state laws could nonetheless co-exist. Nor did the FCC suggest that it was attempting to oust the normal operation of conflict preemption under the combination of its rules and the Supremacy Clause of the U.S. Constitution.

[51] The Commission's attempt to regulate interstate CPNI, and the effect of regulating interstate CPNI, would also raise serious concerns under the Commerce Clause.

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state CPNI differently for affiliate and product development and marketing purposes. If the proposed rule took effect, intrastate CPNI would be subject to opt-in permission before it could be used by an affiliate, and then could be used only subject to the terms of a non-disclosure agreement. Interstate CPNI, however, could be shared freely with affiliates for certain marketing purposes, subject only to opt-out approval. Because very little CPNI is separable by jurisdiction, the more stringent Arizona rules would once again apply even to CPNI over which the state has no jurisdiction, and carriers would be forced to ignore the delicate balance established by Congress.

C. Other Portions of the Adopted CPNI Rules Also Raise Serious Concerns Under the First Amendment and Supremacy Clause.

Although the most significant and obvious problem with the adopted rules is the delayed opt-in regime dictated by the "verification" rule under R 14-2-2108, other provisions raise serious concerns under the First Amendment and federal law as well. The requirement in R 14-2-2110 that carriers send "reminders" to customers regarding their current CPNI release election on an annual basis and independent of any other mailing, while the FCC's rules require additional notice only every two years, is burdensome and could lead to further consumer confusion by adding yet another notice that attempts to distinguish interstate and intrastate CPNI and yet another piece of paper that requires no action contrary to any "verification" notice. This requirement has no independent factual justification in the record, and is infirm under the First Amendment for the reasons outlined above.

IV. CONCLUSION

In order to avoid having R14-2-2108 and any other provisions of Decision 68292 overturned as violating the First Amendment and/or preempted by Section 222 and the FCC's 2002 CPNI Rules, the Commission should grant Verizon's application for rehearing and eliminate the suspect provisions. Verizon is committed to working with the Commission to enhance consumer awareness and ensure effective consumer consent through the FCC's carefully-crafted opt-out regime for use of CPNI.

RESPECTFULLY SUBMITTED this 5th day of December, 2005.

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